



Mandieka v New Design Construction Ltd & 4 others (Civil Suit E013 of 2022) [2025] KEHC 5024 (KLR) (27 March 2025) (Ruling)

Neutral citation: [2025] KEHC 5024 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT E013 OF 2022
OA SEWE, J
MARCH 27, 2025**

BETWEEN

LYNE KERUBO MANDIEKA PLAINTIFF

AND

NEW DESIGN CONSTRUCTION LTD 1ST DEFENDANT

MARIAM ABDIKADIR 2ND DEFENDANT

IBRAHIM BAYAKAL 3RD DEFENDANT

SEYFULLAH GURDAL 4TH DEFENDANT

REGISTRAR OF COMPANIES 5TH DEFENDANT

RULING

1. The plaintiff filed a Notice of Motion dated 17th March 2022 under a Certificate of Urgency praying for a temporary injunction to restrain the 2nd, 3rd and 4th defendants from selling, transferring or dealing with the property known as Land Reference No. 223 (Original No. 179/25 Section IV Mainland North CR. No. 17917 situated in Mtwapa, herein after, “the suit property), shares and other assets of the 1st defendant pending the hearing and determination of the suit. The application was brought under Sections 1A, 3A and 63(e) of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya, Order 40 Rules 1, 2 and 3 and Order 50 Rule 1 of the Civil Procedure Rules.
2. The application was premised on the grounds that, by virtue of being the widow and legal representative of Mustafa Sahin Hakeil (deceased) who held 20% shares in the 1st defendant company, which company is the registered owner of the suit property, the plaintiff has proprietary rights and interest in the said property. She complained that the 2nd, 3rd and 4th defendants had taken over possession of the suit property and seized all the documents of ownership; and that should they sell,



- dispose of or transfer the same to a third party, her claim and proprietary right and interest would stand defeated.
3. The plaintiff further averred that the suit property is now susceptible to waste, and unless restrained by orders of this Court, the defendants will continue to neglect the property, granted that they have since moved out of the property and their physical address is unknown.
 4. In response to the application, the 1st, 2nd, 3rd and 4th defendants filed a Replying Affidavit sworn by the 2nd defendant, Mariam Abdikadir. They deposed that the plaintiff lacks the locus standi to file this suit as she is not the legal representative of the deceased. They further averred that the deceased and the 3rd defendant voluntarily resigned and transferred their respective shares in the company on the 10th March 2018 pursuant to Transfer Deeds and resignation documents of even date, which were annexed to the Replying Affidavit as Annexure “MA-2”.
 5. The defendants further deposed that, upon registration of the resignation and transfer documents at the Companies Registry, the 1st defendant company was issued with a new CR12 Form on the 31st August 2018 reflecting the changes. A copy thereof was annexed to the Replying Affidavit and marked Annexure “MA-4”. They pointed out that the changes predate the date of death of Mustafa Sahin Hakeil, who died on 5th October 2019. The defendants therefore posited that, as at the time of his demise, Mustafa Sahin Hakeil (deceased) was neither a shareholder or director of the 1st defendant. A copy of the deceased’s Burial Permit issued on 5th October 2019 was also annexed to the Replying Affidavit and marked Annexure “MA-5”.
 6. The defendants further deposed that the deceased’s true beneficiaries are a spouse and two children in Turkey; and that the plaintiff was neither a beneficiary nor a spouse of the deceased as at the time of his death. In proof of this averment, they annexed a copy of the List of Beneficiaries from the Department of Registration in Turkey as Annexure “MA-6”. The defendants further disclosed that the deceased’s legal beneficiaries appointed the 3rd defendant as their attorney and gave him instructions to obtain the necessary documents and certificates, conduct burial of the deceased and collect his personal belongings; which instructions were acted upon by the 3rd defendant. A copy of the Power of Attorney issued to the 3rd defendant was also annexed to the Supporting Affidavit and marked Annexure “MA-7”.
 7. With regard to the suit property, the position taken by the defendants was that the company allowed the deceased to continue residing in one of the apartments owned by the company on non-rental basis even after his resignation, owing to the nature of the relationship that existed between him and the directors. They pointed out that the deceased ceased to participate in the affairs of the company after his resignation on 10th March 2018. Accordingly, the defendants averred that the plaintiff has not only failed to establish a prima facie case against them, but has also failed to show that she stands to suffer irreparable harm that cannot be compensated by way of damages.
 8. The defendants further deposed that the value of the subject property and the shares of the 1st defendant are capable of being ascertained; and therefore damages would be adequate as a remedy in the event that the Court finds in favour of the plaintiff. They pointed out that, in her Complaint, the plaintiff prayed for an order of restitution of shares and all profits earned between 2018 and 2022 as damages.
 9. In terms of balance of convenience, the defendants averred that the same tilts in their favour because of the following factors:
 - (a) The plaintiff had no locus standi to institute the suit.



- (b) The 1st defendant's late former director resigned and transferred his shares a year and 8 months before his death, hence the plaintiff is estopped from laying any claim on the shares or assets of the company as the same do not form part of the estate of the deceased.
 - (c) The plaintiff has not adduced any evidence to invalidate the resignation of the director and the transfer of his shares.
 - (d) The alleged forensic report which the plaintiff intends to rely on is inadmissible for the reason that it does not disclose the origins of the signatures under investigation.
 - (e) The deceased's known signature is the one appearing on the company's Memorandum and Articles of Association; which signature also appears on the resignation and transfer documents.
10. Accordingly, the defendants prayed for the dismissal of the application with costs, contending that it is misconceived and is otherwise an abuse of the process of the Court.
11. The application was canvassed by way of written submissions, pursuant to the directions given herein on 27th September 2023. Thus, the plaintiff relied on her written submissions dated 11th October 2023 in which she reiterated the factual basis of the application and proposed the following issues for determination:
- (a) Whether the plaintiff has a prima facie case;
 - (b) Whether the plaintiff stands to suffer irreparable harm for which an award of damages will not be adequate compensation; and,
 - (c) Whether the plaintiff deserves the orders prayed for.
12. The plaintiff relied on *Mrao Ltd v First American Bank* for an explication of what constitutes a prima facie case. She submitted that, based on the material placed before the Court she has demonstrated that:
- (a) she is the widow of the deceased Mustafa Salin Hakeil who was one of the directors of the 1st defendant company;
 - (b) She is the legal representative of the late Mustafa Salin Hakeil; and,
 - (c) The late Mustafa Salin Hakeil did not resign from the 1st defendant company and that the purported documents of resignation are forgeries.
13. The applicant placed reliance on *Giella v Cassman Brown & Company Ltd* [1973] EA and *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR and urged the Court to find that the application and the main suit raise prima facie issues with overwhelming chances of success. She further submitted that she has demonstrated that she stands to suffer irreparable harm should the suit property be sold before the hearing and determination of this suit. She accordingly prayed that her application be allowed and the orders prayed for therein granted.
14. The defendants filed written submissions date 23rd October 2023. They were of the same view that the issues for determination are:
- (a) Whether the plaintiff has a prima facie case with probability of success;
 - (b) Whether the plaintiff will suffer irreparable harm which would not be adequately compensated for by damages;



- (c) Whether the balance of convenience is in favour of granted the interlocutory injunction in favour of the plaintiff.
15. They relied on their Replying Affidavit aforementioned and the cases of Mrao Ltd v First American Bank of Kenya & 2 others (supra), Peter Kairu Gitu v KCB Bank Kenya Ltd & another [2021] eKLR to support their submission that there is no dispute as to the ownership of the suit property and therefore the plaintiff has no beneficial interest in the property or the company. The defendants further submitted that the plaintiff's allegations of fraudulent transfer of shares are baseless in so far as no charges of forgery have been preferred against any of the directors of the 1st defendant.
16. The defendants reiterated their stance that, at the time of his demise, Mustafa Sahin Hakeil was neither a shareholder nor director of the 1st defendant company. They pointed out that the 1st defendant filed a suit before the Environment and Labour Relations Court, namely, New Design Construction Limited v Lyne Kerubo Mandieka [2020] eKLR in which it obtained orders affirming its ownership of the suit property. Consequently, the defendants submitted that the plaintiff stands to suffer no harm; and that if anything, it is the defendants who stand to suffer irreparably should the orders sought be granted to the plaintiff. They relied on the ruling delivered in New Design Construction Limited v Lyne Kerubo Mandieka [2020] eKLR and Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR.
17. The defendants added, on the authority of Chebii Kipkoech v Barnabas Nuitoek Bargoria & another [2019] eKLR, that the balance of convenience lies against granting the interlocutory injunction as they stand to suffer the greater harm than the plaintiff. In their view, granted the temporary injunction in the terms prayed for herein would amount to evicting the 1st defendant and denying it the use, possession and enjoyment of its property. Accordingly, the defendants prayed for the dismissal of the application.
18. I have considered the pleadings, the affidavit evidence presented herein, and the written submissions filed by parties. The guiding principles for the grant of orders of the temporary injunction are well settled and are set out in Giella v Cassman Brown (supra). This position has been reiterated severally and more particularly by the Court of Appeal in Nguruman Limited v Jan Bonde Nielsen & 2 others [CA No.77 of 2012](#) (2014) eKLR, where it was held: -

“...In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially...”



19. Hence, a prima facie case was defined in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* (supra) as follows:

“... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter...”

20. In the premises, the single for determination in the instant application is whether the plaintiff met the laid down conditions for the grant of a temporary injunction. In this regard, the plaintiff pitched the argument that she is the widow of the deceased, Mustafa Salin Hakeil who was one of the directors of the 1st defendant. It was her contention that she is the legal representative of the estate of the deceased and in proof thereof annexed a copy of the Letters of Administration among other documents filed in Mombasa Chief Magistrate’s Succession Cause No. 429 of 2019. They were marked as Annexure “LKM1”. The plaintiff also exhibited a copy of the Forensic Report prepared by the Directorate of Criminal Investigations to demonstrate that the documents in support of the alleged transfer of the deceased’s shares in the 1st defendant company were forged.

21. As against the foregoing, the defendants contended that the allegations of forgery have not been proved; which argument lacks traction granted that at this stage a party need only establish a prima facie case. Proof of the allegations of forgery will be pertinent at the hearing of the main suit. I note that in *New Design Construction Limited v Lyne Kerubo Mandieka* (supra), the Environment and Land Court pronounced itself as to the ownership of the suit property, namely, Land Reference No. 223 (Original No. 179/25 Section IV Mainland North CR. No. 17917) situated at Mtwapa and held that the said property belongs to the company.

22. It is notable that the application, in that instance was filed by the company for a mandatory injunction to compel the plaintiff herein to vacate the suit property. In its ruling herein dated 18th July 2023, the Court made it clear that the nuance taken in this matter is not a property dispute as such but the question whether the estate of the deceased has any stake in the 1st defendant’s shares; including the subject property.

23. In the premises, I am satisfied that the Plaintiff has indeed demonstrated, on a prima facie basis, on behalf of the deceased’s estate, that there is a right which has apparently been infringed by the defendants which calls for an explanation or rebuttal from the latter within the definition of a prima facie case provided in the *Mrao Ltd* Case above.

24. As to whether the Plaintiff stands to suffer irreparable loss, it is now well settled that where there is a manifest breach of the provisions of the law, an applicant cannot be compelled to accept damages as recompense. In *Joseph Siro Mosioma v Housing Finance Company of Kenya Limited & 3 Others* [2008] eKLR, Hon. Warsame, J. (as he then was) held as follows:-

“On my part let me restate that damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be substitute for the loss which is occasioned by a clear breach of the law, in any case, the financial strength of a party is not always a factor to refuse an injunction. More so a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction.”



25. The same position was taken in *Sharok Kher Mohamed Ali & Another v Southern Credit Banking Corporation* [2008] eKLR thus:

“... a party deprived of his property through an illegal process would suffer irreparable loss and/or damage. In any case, a party entitled to a legal right cannot be made to take damages in lieu of his right. In essence the damages and/or loss that would be suffered by the Plaintiffs would be significant if an injunction is not granted. My position is that a party in contravention of the law cannot be rewarded for his contravention. (see also *Olympic Sports House Limited vs. School Equipment Centre Limited* [2012] eKLR)

26. As to whether the balance of convenience is in favour of the Plaintiff, the decision of the Court of Appeal in *Charter House Investments Ltd v Simon K. Sang and Others* Civil Appeal No. 315 of 2004 is instructive that:

“Injunction is an equitable and discretionary remedy, given when the subject matter of the case before the court requires protection and maintenance of the status quo. The award of temporary injunction by courts of equity has never been regarded as a matter of right, even where irreparable injury is likely to result to the applicant. It is a matter of sound judicial discretion, in the exercise of which the court balances the convenience of the parties and possible injuries to them and to third parties.

27. Moreover, it is imperative that the Court opts for the lower rather than the higher risk of injustice. In *Suleiman v Amboseli Resort Ltd* (2004) 2 KLR 589, Ojwang Ag. J (as he then was), quoted with approval the following words of Justice Hoffmann in the English case of *Films Rover International v Cannon Film Sales Ltd* (1986) 3 All ER 772:

“The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the Court may make the ‘wrong’ decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeed (or would succeed) at trial. A fundamental principle is therefore that the Court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been ‘wrong’ ...”

28. In the instant matter, the path leading to the lower risk of injustice would be to sustain the status quo by granting the orders sought pending the hearing and determination of the plaintiff’s case.

29. In view of the above, it is my considered view that the plaintiff has made out a case to warrant the grant of a temporary injunction as sought. Accordingly, the Notice of Motion dated 17th March 2022 is hereby allowed and orders granted as follows:

- (a) That pending the hearing and determination of this suit, a temporary injunction be and is hereby granted restraining the 2nd, 3rd and 4th defendants by themselves, their agents, servants, employees and any other person acting on their instructions and/or authority from selling, disposing off, transferring and/or dealing with the property known as Land Reference No. 223 (Original No. 179/25 Section IV Mainland North CR. No. 17917 situated in Mtwapa in whatsoever manner.
- (b) That pending the hearing and determination of this suit, a temporary injunction be and is hereby granted restraining the 2nd, 3rd and 4th defendants by themselves, their agents, servants,



employees and any other person acting on their instructions from transferring, disposing of shares, assets and/or any property of whatsoever nature owned by the 1st defendant and/or registered in the name of the 1st defendant.

(c) That the costs of the application be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 27TH DAY OF MARCH 2025

OLGA SEWE

JUDGE

